(1)

No. 89-1286

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

RICARDO M. FRANK,
Petitioner,

vs.

LISA S. MORANDO, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FIRST APPELLATE DISTRICT

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16 pp

QUESTIONS PRESENTED

1. Whether a declaration of nonpaternity pursuant to California Civil Code § 7004(a)(1), without balancing the competing state and personal interests at stake, denies the "former" assumed biological father due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

2. Whether, where both parents have judicially conceded their child to be a "child of the marriage" upon marital dissolution, the mother can thereafter invoke the young child's cause of action under California Civil Code § 7006(a)(2) (where both mother and father would have been barred from invoking their own) to dispossess the father of his paternal rights, without violating the due process rights of both the father and the child.

3. Whether California Evidence Code § 621, as construed by this Court's opinion in *Michael H. v. Gerald D.* (1989) ____ U.S. ____, 109 S.Ct. 2333 should not have been conclusively applied to the facts of this case to prevent the declaration of Petitioner's nonpaternity in violation of his due process rights.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FIRST APPELLATE DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of California, First Appellate District, filed in this proceeding July 21, 1989.

THE OPINION BELOW

The opinion of the Court of Appeal, filed July 21, 1989, is not a published opinion, and is reproduced hereafter in the Appendix.

JURISDICTION

This petition for writ of certiorari is filed within 90 days of October 11, 1989, the date of the filing of the order of the Supreme Court of the State of California, denying Petitioner's petition for review. Said Petition for Review was timely filed on August 21, 1989, of the denial by the California Court of Appeal,

First Appellate District, of Petitioner's Petition for Rehearing, following rendition of the judgment and opinion from which this writ is sought.

The jurisdiction of this Court is invoked under 18 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 14 § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Civil Code § 7004(a)(1) provides:

> A man is presumed to be the natural father of a child if hemeets the conditions as set forth in Section 621 of the Evidence Code or in any of the following paragraphs:
>
> (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by by the court.
>
> . . .

California Civil Code § 7006(a)(2) provides:

> A child, the child's natural mother, or a man presumed to be the child's father under paragraph (1), (2), or (3) of subdivision (a) of Section 7004, may bring an action as follows:
>
> . . .

> (2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. . . .

California Evidence Code § 621 provides:

> (a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.
>
> (b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.
>
> (c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.
>
> (d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child. . . .

STATEMENT OF THE CASE

In this case, a declaration of nonpaternity was sought againt the Petitioner Ricardo M. Frank, at a time when his daughter (the Respondent herein, Sarah Justine Frank) was four years old, and two years after Ricardo and Sarah's mother, Lisa, had dissolved their marriage. Sarah had been born 8¼ months into the marriage, and Ricardo and Lisa had cohabited during the six months of their engagement prior to the marriage. Both Lisa in her petition for dissolution of marriage, and Ricardo in his response, declared Sarah a "Child of the marriage", and thereon orders for

Ricardo's payment of child support, along with orders for joint legal custody and shared physical custody. Ricardo of course at all times believed himself to be the biological father of Sarah. Ricardo maintained all his support payments, and maintained a close father-daughter relationship throughout the marriage and thereafter past dissolution, until Lisa met her second husband, and initiated this action for a declaration of nonpaternity of Ricardo when Sarah was almost four years old. There is no claim that Lisa's second husband James Morando is Sarah's biological father, and there is no claim that any man is Sarah's biological father. Lisa later sought to become Sarah's guardian ad litem in order to bring the same action, under California Civil Code section 7006 on Sarah's behalf as well. [It is clear that Lisa could not prevail under Evidence Code § 621, as the two-year period had passed; and that her own action under Section 7006 was belated, due to her own knowledge of the "relevant facts," that is, who the biological father was, a fact unknown to anyone else in these proceedings to this date.] A guardian ad litem other than Lisa (Lisa's sister) was eventually appointed, and the matter finally proceeded on the child's cause of action alone, wherein it was shown by blood tests that Ricardo was not the biological father, and he was thereupon stripped of his parental rights.

Ricardo had argued that Evidence Code § 621 should have applied to conclusively establish his fatherhood, in that all other factors being present, the actual date of conception was irrelevant (and impossible to establish) as long as the pregnancy was scientifically probable; that collateral estoppel should have barred relitigation of the paternity issue in any event, both parents having judicially admitted same in the dissolution matter. As California hss noted and this Court has noted in *Michael H.*, 109 S.Ct. 2343, supra, § 621 is not concerned with biological fact, but with family stability. Ricardo had also argued that the trial court should not have severed his paternal rights without balancing the competing state and personal interests at stake. The Court of Appeal specifically rejected this contention on the ground that such due process is due only *biological* fathers. [Page 4 of Opinion]. Ricardo also continually raised the objection that Sarah was not the "real actor" here, as had been a concern of the California Supreme Court in prior cases [*Michelle W. v. Ronald W.* (1985) 39 C.3d

354, 360-3], and that her own due process interest in maintaining her relationship with her only known father was never protected by the court.

REASONS WHY THE WRIT SHOULD BE GRANTED

The tragic outcome of this case, compelled by blood tests at the instance of an unknowing minor, but initiated by the only party with any fault, the mother, offends any sense of justice, and any sense of substantive due process. California law and this Court recently in *Michael H.* confirmed that biological fatherhood is not recognized as paramount. The family relationship, even the dissolved family relationship, is. Terminating this father's parental rights so belatedly works a tragedy of monumental proportions to this father and to this child. That this result could only be accomplished through the unknowing child's so-called "independent cause of action" is a legal fiction all the more offensive for the result it spawned. This case leaves virtually every father/child relationship at peril, after love and financial support, if the cheating mother decides to act years later "through" the child's cause of action, as here.

CONCLUSION

This Writ should be granted, so that that most profound of human relationships, parenthood, can be more fully protected and defined within and beyond *Michael H. v. Gerald D.*

Respectfully submitted,

BERNARD N. WOLF

(Appendix to follow)

In the Court of Appeal of the
State of California
First Appellate District
Division Five

A043258
Contra Costa Supr. Ct.
No. 299655

Guardianship of Sarah Justine Morando, a Minor.
Lisa S. Morando et al.,
Petitioners and Respondents,
v.
Ricardo M. Frank,
Objector and Appellant.

[Filed Jul 21 1989]

Ricardo M. Frank appeals from a judgment declaring he is not the legal or natural father of Sarah Justine Morando. We affirm.

Sarah was conceived on or before January 24, 1983. At the time her mother, Lisa, cohabited with Ricardo. Lisa and Ricardo underwent a marriage ceremony, the validity of which is disputed, on February 22, 1983. A second marriage ceremony was performed on April 17, 1983. Sarah was born on October 28, 1983.

Lisa and Ricardo separated on November 12, 1984, and Lisa filed a dissolution petition naming Sarah as a child of the marriage. A 1985 dissolution judgment provided for joint legal custody and shared physical custody of Sarah and required Ricardo to pay child support. Lisa married James W. Morando on June 14, 1986.

Blood tests performed in February-March 1987 and in April-May 1987 revealed that Ricardo is not Sarah's biological father. On April 15, 1987, Lisa and James filed a petition for a declaration of nonpaternity. The petition was later amended to add Sarah as a petitioner through a guardian ad litem. In an amended answer Ricardo admitted that when he married Lisa she had been pregnant with Sarah.

The court determined the following by summary adjudication under Code of Civil Procedure section 437c: (1) the conclusive presumption of paternity prescribed by Evidence Code section 621 was inapplicable, (2) the rebuttable presumption of paternity prescribed by Civil Code section 7004, subdivision (a)(1), was applicable, and (3) the action by Sarah was commenced within a reasonable time as required by Civil Code section 7006, subdivision (a)(2).

At trial the court proceeded only on Sarah's cause of action. Ricardo's counsel indicated he would present no evidence contradicting the blood tests, and the only evidence he intended to offer was that Lisa should be estopped to challenge paternity, on the theory that such estoppel should extend to Sarah. The court deferred any presentation of evidence on estoppel, and subsequently ruled that Sarah was not bound by Lisa's conduct and therefore there was no need to recieve the estoppel evidence.

The court rendered a judgment declaring Ricardo was not Sarah's legal or natural father and had no parental rights or obligations, including the obligation to pay child support. James subsequently adopted Sarah.

Ricardo contends the court should have granted his motion for summary judgment based on the conclusive presumption of paternity set forth in Evidence Code section 621. This statute provides that, except where blood tests sought by motion within two years of a child's birth prove otherwise, "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." (Evid. Code. § 621, subd. (a).)

The conclusive presumption, however, applies only if the child was conceived while the mother and presumed father were married. (E.g., *Jackson v. Jackson* (1967) 67 Cal.2d 245, 247; see also *Michael H. v. Gerald D.* (1989) ____ U.S. ____ [89 Daily Journal D.A.R. 7755, 7757].) It is unclear whether Lisa and Ricardo were legally married on February 22, 1983, or not until April 17, 1983, but the ambiguity is inconsequential, since Lisa's obstetrician asserted that the earliest date conception could have occurred was January 24, 1983. Ricardo presented no

contrary medical evidence, and he even admitted in his answer that when he married Lisa she had been pregnant. (See 1 Witkin, Cal. Evidence (3d ed. 1986) § 644, p. 630 [admission in a pleading is a conclusive concession].)

Because it was factually indisputable and legally undisputed that Sarah was conceived before the marriage, the court properly determined by summary adjudication that the conclusive presumption prescribed by Evidence Code section 621 was inapplicable. The only applicable presumption was that set forth in Civil Code section 7004, which applies where the child is born during the marriage (Civ. Code, § 7004, subd. (a)(1)) but is rebuttable by clear and convincing evidence (Civ. Code, § 7004, subd. (b)).

Ricardo contends the court denied him due process by declaring nonpaternity and severing his relationship with Sarah without balancing the competing state and personal interests at stake. But the decisions upon which he relies impose this due process limitation only on paternity adjudications as to *biological* father and child. (See *Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354, 363; *Estate of Cornelious* (1984) 35 Cal.3d 461.) The law does not impose the due process balancing test where, as here, the evidence of the presumed father's actual nonpaternity is undisputed.

Finally, Ricardo asserts three arguments based solely on the theory that Sarah's legal position should have been treated as identical to that of Lisa. He contends that Lisa, and thus Sarah, (1) did not bring the nonpaternity action within a reasonable time as required by Civil Code section 7006, subdivision (a)(2), (2) should be equitable estopped to deny Ricardo's paternity because of Lisa's conduct in holding Sarah out as a child of the marriage, and (3) should be precluded from litigating paternity by collateral estoppel effect of the dissolution judgment as between Lisa and Ricardo treating Sarah as a child of the marriage.

The theory underlying these arguments lacks decisional support and is directly contrary to Civil Code section 7006, subdivision (a), which authorizes a nonpaternity action by a child, the child's natural mother, or a presumed father. The sole decision cited by Ricardo, *Michelle W. v. Ronald W., supra,* 39 Cal.3d at pages

360-363, simply expressed concern that the child in that case was not the real actor in the paternity action, so that the court would not assume the child was asserting rights that were in her best interests. (*Ibid.*) The court did not hold that a minor who is litigating under the direction of her mother or a presumed father must be placed in the same legal position as the adult; indeed, the court expressly refused to view the minor's action in this manner. This is consistent with section 7006, subdivision (a), which authorizes legal action by a minor independent of the natural mother or presumed father. Sarah was entitled to proceed independently and hence unencumbered by any untimeliness, equitable estoppel or collateral estoppel as to Lisa.

The judgment is affirmed.

_____

King, J.

We concur:

_____

Low, P.J.

_____

Haning, J.

Court of Appeal of the
State of California
in and for the
First Appellate District
Division: 5

Morando, Lisa S., et al.
vs.
Frank, Ricardo M.
A043258
Contra Costa County No. 299655

[Filed Aug 21 1989]

By the Court:

The petition for rehearing is denied.

Dated: Aug 21 1989

LOW, P.J. P.J.

(Before Low, P.J., King, J. and Haning, J.)

Order Denying Review

After Judgment by the Court of Appeal
First Appellate District,
Division Five, No. A043258
S011840

In the Supreme Court of the
State of California

IN BANK

Guardianship of Sarah Justine Morando, A Minor
Lisa S. Morando et al., Respondents
v.
Ricardo M. Frank, Appellant

[Filed Oct 11 1989]

Appellant's petition for review DENIED.

The request for an order directing publication of the opinion in the above entitled cause is denied.

KAUFMAN
Acting Chief Justice